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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>GREGORY BOYD, JR.,<br>Defendant and Appellant. | A103093<br><br>(Contra Costa County<br>Super. Ct. No. 021503-8) |

A jury convicted defendant of five drug-related offenses. He contends the trial court erroneously admitted evidence of certain uncharged drug-related crimes. We affirm.

## BACKGROUND

Defendant was charged in a consolidated and amended information with two counts of possessing marijuana for sale (counts one and five, Health & Saf. Code, § 11359), two counts of possessing cocaine base for sale (counts two and four, Health & Saf. Code, § 11351.5), and one count of transporting cocaine base (count three, Health & Saf. Code, § 11352, subd. (a)). The counts were based on three different incidents.

On November 18, 2001 (count five), police stopped a car driven by defendant. Approaching the car, the officer spotted and smelled signs of marijuana use. A pat search of defendant yielded a clear plastic bag containing 14 baggies of marijuana and a hand-rolled marijuana cigarette. A police expert opined that defendant possessed the marijuana for sale.

On January 6, 2002 (count four), police responded to a pharmacy to investigate a report of shoplifting. A search of the purported shoplifter, defendant, turned up $932 in cash and a small bag containing 11 individually-wrapped pieces of cocaine base. Again, a police expert opined that defendant possessed the cocaine for sale.

Finally, on May 6, 2002 (counts one, two and three), police stopped a vehicle with no license plates. As the car came to a stop, the two passengers emerged and fled on foot. Defendant remained behind in the driver's seat. The police seized a bundle of plastic with what was later determined to be cocaine base from the rear floor of the car. After defendant's arrest, a search of his person netted $735 in cash, a collection of Ziploc bags, a bag with 17 individual packages of marijuana, and a bag containing baggies of cocaine base. As with the first two arrests, a police expert opined that the drugs were possessed for sale.

In addition to the foregoing evidence, the prosecution was permitted to introduce evidence of two instances of uncharged criminal conduct by defendant.[1] The first resulted from a June 12, 2002 probation search of a bedroom in an apartment in which defendant was a tenant. The bedroom contained six marijuana plants, a safe containing two large bags of marijuana and $1,680 in cash, several sandwich bags of marijuana, a digital scale, a package of empty baggies, and written materials bearing defendant's name. The second resulted from a traffic stop of defendant in August 2002, when he was found to be carrying a baggie with 13 individually-wrapped packages of marijuana.

A primary issue at trial was defendant's purpose in possessing the illegal drugs. Defense counsel argued that defendant possessed the drugs for his own use. In cross-examination of the police expert, defense counsel elicited testimony that, in each arrest the cocaine and marijuana found could have been possessed for personal use.

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[1] Although the prosecution initially suggested to the trial court that it intended to present evidence from an August 6, 2001 incident as well and the trial court initially ruled such evidence admissible, we have found no indication that evidence of the August 2001 incident was actually presented at trial. In any event, defendant has not raised an objection to the admission of such evidence on appeal.

The jury found defendant guilty of possession for sale on counts one and four, of the lesser included offense of possession on counts two and five, and of transportation on count three. He was sentenced to the middle term of four years on count three, with the middle terms on the remaining counts to run concurrently.

## DISCUSSION

Defendant contends that the trial court erred by admitting evidence of the uncharged drug-related offenses. He claims the evidence was improperly admitted to prove intent and was unduly prejudicial under Evidence Code section 352.

### *A. Evidence Code Section 1101*

The considerations governing the admission of evidence of uncharged criminal acts by a defendant were summarized by the Supreme Court in *People v. Thompson* (1980) 27 Cal.3d 303 (*Thompson*): "The admission of any evidence that involves crimes other than those for which a defendant is being tried has a 'highly inflammatory and prejudicial effect' on the trier of fact. This court has repeatedly warned that the admissibility of this type of evidence must be 'scrutinized with great care.' '[A] closely reasoned analysis' of the pertinent factors must be undertaken before a determination can be made of its admissibility. [¶] Evidence of an uncharged offense is usually sought to be admitted as 'evidence that, if found to be true, proves a fact from which an inference of another fact may be drawn.' [Citation.] As with other types of circumstantial evidence, its admissibility depends upon three principal factors: (1) the *materiality* of the fact sought to be proved or disproved; (2) the *tendency* of the uncharged crime to prove or disprove the material fact; and (3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence. [Citation.]" (*Thompson,* at pp. 314–315, fns. omitted; see also *People v. Carpenter* (1997) 15 Cal.4th 312, 378.)

The primary "rule or policy" requiring exclusion of evidence of uncharged criminal acts is Evidence Code section 1101, subdivision (a), which requires the exclusion of "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) . . . when offered to prove his or her conduct on a specified occasion." The

theory behind section 1101, which has deep roots in the Anglo-American legal system, is that evidence that a defendant has committed crimes other than those currently charged cannot be admitted solely for the purpose of proving that the defendant is a person with a propensity to criminal conduct. (*People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Ortiz* (2003) 109 Cal.App.4th 104, 111 (*Ortiz*).) Such evidence is barred because it risks " 'provoking' . . . 'an overstrong tendency to believe defendant guilty' based on the commission of the *prior* acts rather than those charged in the pending prosecution. In short, the evidence is barred to prevent conviction based upon the defendant's 'bad character.' " (*Ortiz,* at p. 111, quoting 1A Wigmore on Evidence (Tillers rev. 1983) § 194, at p. 1859.) If proving a propensity to criminal conduct is the only theory under which such evidence is relevant, it is inadmissible. (*Thompson, supra,* 27 Cal.3d at p. 316.)

The Evidence Code, however, recognizes that evidence of uncharged criminal acts can be relevant for reasons other than to prove bad character. Accordingly, subdivision (b) of section 1101 authorizes the admission of evidence of criminal acts otherwise excludable under subdivision (a) if the acts are "relevant to prove some fact . . . other than [the defendant's] disposition to commit [a criminal] act." Evidence is most commonly admitted under subdivision (b) to prove (1) the defendant's intent, (2) a common design or plan between the uncharged and charged crimes, and (3) that it was the defendant who committed the charged crime, based on his or her commission of a very similar uncharged crime. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402–403 (*Ewoldt*).)[2] In order to be admissible under section 1101, the uncharged criminal acts must bear some resemblance to the charged crime, with the requisite degree of similarity varying depending upon the purpose for which the evidence is admitted. (*Ibid.*)

[2] Although the rule of *Ewoldt* has been superceded by statute in certain sex-related crimes (see *People v. Britt* (2002) 104 Cal.App.4th 500, 505), those statutory changes are not relevant here.

The trial court's decision to admit evidence of uncharged crimes is reviewable for abuse of discretion. (*People v. Kipp, supra,* 18 Cal.4th at p. 369; *Ortiz, supra*, 109 Cal.App.4th at p. 117.)

We consider the two instances of uncharged criminal acts separately.[3] The first was the presence of marijuana among the evidence seized from defendant's apartment in June 2002. Defendant contends that this uncharged act, the possession of marijuana, was not sufficiently similar to the charged crimes to permit its admission under *Ewoldt.*

We apply the three-part analysis of *Thompson,* requiring an analysis of materiality, tendency to prove, and exclusionary policy. As to materiality, the evidence taken from defendant's apartment was offered to prove that he possessed marijuana for the purpose of selling, not merely using it and that, by inference, he possessed the cocaine for that purpose as well. Because the reason for defendant's possession was the primary element in distinguishing possession for sale and the lesser offense of simple possession, the evidence undoubtedly related to a material fact. The evidence also tends to prove the charges. An unusually large amount of cash, a large quantity of an illegal drug, a digital scale, and baggies for packaging are all suggestive of the possession and preparation of drugs for sale. The presence of these indicators of the drug trade in defendant's home in June 2002, only one month after defendant's most recent arrest, was probative on all four of counts of possession for sale.

The final element in the *Thompson* analysis is the existence of a rule or policy barring admission. On this element, the legal analysis differs among the counts of the information. As to the first count, which charged possession of marijuana for sale growing out of the May 2002 arrest, Evidence Code section 1101 is inapplicable. Section 1101 bars "evidence of a person's character . . . when offered to prove his or her conduct on a specified occasion." Because the search occurred only one month after the

[3] Although the People's appellate brief asserts that defendant is not challenging admission of evidence of the August 2002 incident, defendant's brief addresses both incidents, and we consider both.

arrest leading to the first count, the large quantity of marijuana, the large amount of cash, the packaging materials, and the scale found in the apartment tended *directly* to refute defendant's claim that the marijuana seized in May 2002, was possessed for personal use, rather than for sale. Accordingly, the materials in defendant's apartment were not "character evidence"—that is, evidence of a crime other than the one charged, admitted to prove the charged crime through inference—but were directly probative of the crime charged in count one.

In contrast, the evidence was subject to Evidence Code section 1101 when offered in connection with the other three counts of possession, all of which were more distant in time or involved a drug other than marijuana. In essence, the prosecution was using evidence that defendant was engaged in the sale of marijuana in June 2002 to prove that when he possessed marijuana in November 2001, and cocaine on two dates in 2002, his intent was to sell those drugs as well.[4] Under *Ewoldt,* evidence of uncharged criminal acts is admissible to prove intent if the uncharged conduct is "sufficiently similar [to the charged offense] to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." [Citations.]' " (*Ewoldt, supra,* 7 Cal.4th at p. 402, quoting *People v. Robbins* (1988) 45 Cal.3d 867, 879.) We find the incidents sufficiently similar in nature to satisfy *Ewoldt.* The prosecution provided evidence that near the time the defendant was caught in a vehicle with individually-wrapped samples of marijuana and cash hidden on his person in May 2002, he possessed a larger quantity of marijuana in his residence, along with a safe, a large quantity of cash, and the means to measure and bag the marijuana. All of these are indicia of an intent to sell. From this evidence, the jury was invited to infer that when on other occasions defendant possessed illegal drugs in a vehicle under virtually identical circumstances, he was engaged in the same activity. While the act of possessing the indicia of drug sales at home is not identical to the act of

[4] The trial court refused to admit this evidence for the purpose of proving a common design or plan, deeming it insufficiently similar to satisfy *Ewoldt* on this ground.

traveling by vehicle with individually-wrapped packages of drugs, the conduct in which defendant was engaged when he was arrested in May 2002, near the time when he possessed those indicia of drug sales at home, is sufficiently similar to the other charged crimes to permit an inference of identical intent under those similar circumstances. We find no abuse of discretion in the trial court's decision to admit this evidence pursuant to Evidence Code section 1101, subdivision (b).

The second instance of uncharged criminal conduct was derived from an August 2002 traffic stop, when defendant was found to possess over a dozen small packages of marijuana. Again, this evidence was offered for the purpose of proving the material issue of intent. Because this incident was essentially identical to the charged conduct, the evidence added little probative weight to the evidence of the charged crimes. Given this substantive identity, however, we find no abuse of discretion in the trial court's decision to admit this evidence under *Ewoldt*.

***B. Evidence Code Section 352***

Evidence Code section 1101 does not end the inquiry. "Evidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis. [Citations.]' [Citations.] 'Since "substantial prejudicial effect [is] inherent in [such] evidence," uncharged offenses are admissible only if they have *substantial* probative value.' [Citation.] [¶] . . . We thus proceed to examine whether the probative value of the evidence of defendant's uncharged offenses is 'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' (Evid. Code, § 352.)" (*Ewoldt, supra,* 7 Cal.4th at p. 404.) Pursuant to *Ewoldt*, the probative value of the evidence must be weighed against its potential for undue prejudice, determined by (1) its inflammatory nature relative to the charged offenses, (2) the risk of issue confusion, (3) its remoteness, and (4) the consumption of time. (See *People v. Branch* (2001) 91 Cal.App.4th 274, 283–285.)

The evidence from the June 2002 search was highly probative on the issue of intent, since the scale, the cash, the large quantity of marijuana and the packaging baggies

strongly suggested that defendant was engaged in the activity of selling illegal drugs in June 2002. Weighed against this substantial probative value is its potentially prejudicial effect, measured by the four factors of *Ewoldt*. Although the possession of a large quantity of marijuana tends to suggest criminal intent, it is not substantially more inflammatory than the possession of many small packages of marijuana and cocaine base, which also suggests an intent to sell. Because this evidence was admitted as evidence of the reason for defendant's possession of drugs, and was admitted with an appropriate limiting instruction to that effect, there was little risk that the jury would be sufficiently confused to convict defendant for the purpose of punishing the uncharged crime, without regard to his guilt on the charged crimes. Obtained approximately seven months after the most remote charged crime, the evidence was sufficiently near in time to retain its relevance. Finally, presentation of the evidence required only a few minutes of testimony. Accordingly, there was no abuse of discretion in the trial court's conclusion that the probative value of this evidence outweighed any risk of undue prejudice.[5]

As noted above, the evidence from the August 2002 stop added little to the evidence of intent. Weighed against this slight probative value, however, was a slight risk of prejudice. Because the stop was indistinguishable from two of the charged offenses, there was no risk that it would be more inflammatory. On the contrary, because the August 2002 stop involved evidence of defendant's personal use of marijuana, it supported the defense argument that he possessed the drugs for his own use. Second, there was little risk of issue confusion. Given the similar nature of the August 2002 stop

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[5] While it is true that this evidence could have played a significant role in the jury's decision on the two counts for which defendant was found guilty of possession for sale, "[i]t is important to keep in mind . . . [that] '[e]vidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. . . . " 'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging".' " (See *People v. Branch, supra,* 91 Cal.App.4th at p. 286.) Nothing in this evidence risked creating an emotional bias against defendant as an individual.

to the charged crimes, there was no reason for the jury to incline toward punishing defendant for the uncharged offense, without regard to his guilt on the crimes charged. Finally, the August 2002 offense was near in time to the charged offenses and did not consume an inordinate amount of trial time. Despite the comparatively minor probative value of this evidence, because it carried little risk of prejudice its admission did not constitute an abuse of discretion.

In any event, given the similarity of the August 2002 incident to the charged crimes and the relative lack of attention the incident received at trial, its admission does not rise to the level of prejudicial error under either *Chapman v. California* (1967) 386 U.S. 18 or *People v. Watson* (1956) 46 Cal.2d 818, 836. The lack of prejudice is evident from the jury's verdict, which distinguished among the charges of possession, finding defendant guilty of possession for sale on two of the four counts of possession and rejecting the evidence of intent on the other two counts.

**DISPOSITION**

The judgment is affirmed.

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Margulies, J.

We concur:

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Stein, Acting P.J.

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Swager, J.